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CHIP LAM SENG ENTERPRISE BHD (IN LIQUIDATION) v. EUPHORIA TECHNOLOGIES SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[ORIGINATING SUMMONS NO: 24NCC-211-05-2015]
B 20 SEPTEMBER 2016

CIVIL PROCEDURE: *Discovery – Inspection of documents – Rules of Court 2012, O. 24 – Transfer of sale shares – Whether void for want of good faith and valuable consideration – Whether true value of sale shares dependant on financial standing* C *of company – Whether documents sought relevant to issues in dispute – Whether a mere fishing expedition – Whether documents sought in possession, custody and power of defendants – Whether liquidator would be limited or restricted from performing statutory duty if documents only made available for directors of company – Whether discovery and inspection of documents necessary to dispose of originating* D *summons fairly – Whether liquidator proved essential elements for order for discovery – Companies Act 1965, ss. 174, 233 & 293 – Bankruptcy Act 1967, s. 52*

CIVIL PROCEDURE: *Documents – Discovery and inspection of documents – Rules of Court 2012, O. 24 – Transfer of sale shares – Whether void for want of good faith and valuable consideration – Whether true value of sale shares dependant on* E *financial standing of company – Whether documents sought relevant to issues in dispute – Whether a mere fishing expedition – Whether documents sought in possession, custody and power of defendants – Whether liquidator would be limited or restricted from performing statutory duty if documents only made available for directors of company – Whether discovery and inspection of documents necessary to* F *dispose of originating summons fairly – Whether liquidator proved essential elements for order for discovery – Companies Act 1965, ss. 174, 233 & 293 – Bankruptcy Act 1967, s. 52*

The plaintiff, a private company, through its liquidator, filed an action *vide* originating summons ('OS') against the first defendant and the second G defendant, pursuant to s. 293 of the Companies Act 1965 ('Companies Act') read with s. 52 of the Bankruptcy Act 1967 ('Bankruptcy Act') and/or under the inherent jurisdiction of the court. The reliefs sought, *inter alia*, were for a declaration that the transfer of the plaintiff's 500,000 shares ('sale shares') held in the second defendant to the first defendant were absolutely void as H against the liquidator of the plaintiff. The plaintiff owned the said sale shares which was the entire shares issued in the second defendant which made the second defendant a wholly owned subsidiary of the plaintiff. On 6 December 2013, the plaintiff disposed of the sale shares *vide* a share sale agreement to the first defendant for a purchase price of RM100,000. On 24 February 2014, I an order winding up the plaintiff was made and a liquidator was appointed. The sale of the sale shares was discovered by the liquidator in the course of his investigations into the affairs of the plaintiff, in particular, concerning its shareholding and its subsidiaries. It was only after the OS was filed and served on the defendants that the first defendant affirmed that it had paid the

purchase price of RM100,000 which was determined based on the evaluation of the second defendant's audited financial status as at financial year 2013. For the liquidator to verify the financial position of the second defendant for the year 2013, he required all the requisite books and records, which would in turn assist him to verify the value of the sale shares. Due to the failure of the first and second defendant to disclose any material information, the liquidator believed RM100,000 may not reflect the true value of the sale shares. Thus, the plaintiff filed an application for discoveries and inspection of documents pursuant to O. 24 of the Rules of Court 2012 ('RC') (encl. 13). It was submitted that for the sale shares to be considered being disposed of at a true and fair value, the sale shares must reflect the value of the second defendant. For that purpose, the plaintiff needed the documents relating to the valuation of the consideration price for the sale shares as stated at prayer 1(d) and supporting documents in respect of the balance sheet and income statement for the year 2013 as stated in prayer 4(a) and (b) of encl. 13. The defendant, however, submitted that the discovery order sought by the plaintiff was merely a fishing expedition to improve its case. The first defendant also contended that the plaintiff had no *locus* to request for the inspection of the books and records of the second defendant, which could only be inspected by the directors pursuant to s. 167 of the Companies Act. It was the first defendant's position that the purchase of the sale shares was in order and above board whereby good consideration was given and there was no breach of the Companies Act and Bankruptcy Act.

Held (allowing prayer 1(d), 4(a) and (b) of encl. 13):

(1) The OS is concerned with the transfer of the sale shares and the true value of sale share which was very much dependent on the financial standing of the second defendant. Thus for that purpose, the books, records and documents which made up the financial statement of the second defendant relating to the entries in the balance sheet, income statement and cash flow will have to be examined for the purpose of determining the company's worth which would eventually reflect the value of the share. The books, records and documents sought related to matters in question in the OS, namely, the value of the sale shares which would eventually determine whether the transfer of the sale shares was void for want of good faith and valuable consideration. If the figures stated in the financial statement could not be substantiated, this would consequently cast serious doubt whether the value of the sale shares which was fixed at RM100,000 was the true value. Therefore, the documents sought to be discovered by the plaintiff was likely to shed some light as to the second defendant's worth which was relevant to the issues in dispute. The plaintiff had made known the documents which were required to be disclosed as expressly stated in prayer 1(d), 4(a) and (b) of encl. 13. As such, the plaintiff could not be said to be on a fishing expedition. (paras 31-33)

(2) The cause of action herein was not one of fraud, rather for declaratory relief that the transfer of the sale shares be declared void for want of good faith and valuable consideration. The plaintiff's encl. 13 for discovery was not made under s. 106 of the Evidence Act 1950 but pursuant to O. 24 RC. The mere fact that discovery is allowed cannot be said to have shifted the burden of proof on the defendants because such burden still remained with the plaintiff to prove its case under s. 293 of the Companies Act read with s. 52 of the Bankruptcy Act. This was so because the documents may contain information which adversely affect or support the plaintiff's case. Upon the disclosure and inspection of the documents sought, the plaintiff was still required to sift through the information so as to, *inter alia*, determine the material facts to support its case by checking and verifying the evidence it relied on and to narrow the points in issue. Therefore, the onus of proving the transfer of the sale shares was void for want of good faith and valuable consideration was, at all material times, on the plaintiff. (paras 36 & 37)

(3) Taking into consideration the OS and the facts as garnered from the affidavits filed, s. 52 of the Bankruptcy Act was the relevant provision to be invoked. As such, the liquidator would need to inquire into the basis and justification of the value of the sale shares at RM100,000 to determine whether the said consideration was a valuable consideration. And that could only be done by perusing the details in the financial statements which constituted the second defendant's audited financial year 2013. (para 41)

(4) The items sought, which included documents relating to the valuation of the sale shares, accounting books and records in relation to the entries in the balance sheet and documents in relation to entries in the income statement such as entries under the headings of "Revenue" and "Administrative Expenses" were without doubt documents. The first defendant did not dispute or deny that what was sought to be discovered were documents. Likewise, the second defendant did not dispute or deny the same. Under the circumstances, by virtue of the case of *Ng Hee Thoong*, it was concluded that the documents sought by the liquidator was in the possession, custody and power of the said defendants. (paras 42-44)

(5) The liquidator, an officer of the court, is obliged to perform his duty by exercising the powers vested in him under the Companies Act. The liquidator was in a fiduciary position in relation to the plaintiff. Collating and collecting information and documents is part and parcel of the process to determine and identify the assets to which the plaintiff is or appears to be entitled (s. 233 of the Companies Act). The defendant's proposition, that such documents were only available for the directors, would limit and restrict the liquidator from performing its statutory duty. Furthermore, such limitation would prejudice the

plaintiff's creditors who were entitled to share rateably in the plaintiff's assets upon realisation and distribution of the assets. It was only right for the liquidator to have access to the books and records of the second defendant for the financial year 2013, at which time the plaintiff was the sole contributory of the second defendant, for the purpose of verifying the value of the sale shares. To deprive the liquidators from discovering such records would defeat the very purpose of discovery to enable the court to identify the evidence that was safe to rely on as a basis for the findings on disputed facts. Since the documents required relate to matters in question in the OS, the discovery and inspection of the documents was necessary so as to dispose of the OS fairly. (paras 45 & 46)

(6) The auditor of the second defendant in discharging his statutory duty to prepare the accounts for the financial year ended 2013 owed a duty of care to the body of the shareholders of the second defendant, and at that material time the plaintiff was the sole shareholder holding the entire issued shares in the second defendant (s. 174 of the Companies Act). The auditor is obliged to form an opinion as to whether all information and explanations required is obtained and shall state particulars of any deficiency, failure or shortcomings in respect thereof. Due to the statutory duty owed by the auditor to the plaintiff, it was only appropriate and reasonable for the plaintiff to be supplied with the supporting documents sought to be discovered by the plaintiff *vide* encl. 13. (para 52)

(7) When the second defendant's lands were disposed of, the second defendant was not a subsidiary of the plaintiff as the plaintiff had divested its entire shareholding in the second defendant. At the time when the plaintiff divested its entire shares in the second defendant to the first defendant, the said lands were the second defendant's assets. This ought to be a concern to the liquidator as the second defendant's worth would eventually determine the value of the second defendant which depended, amongst others, on the assets it owned. What more, within two years after the plaintiff transferred the sale shares to the first defendant, the plaintiff was wound up. Such transfer may amount to undue preference prohibited under s. 293 of the Companies Act. Therefore, the liquidator had every reason to be concerned with the second defendant's lands insofar as the said lands were the second defendant's assets at the time the sale share were disposed of by the plaintiff, especially so when the liquidator was obliged to duly manage and administer the plaintiff's assets towards winding up the plaintiff in accordance with the Companies Act. Thus, the liquidator had proved the essential elements for an order for discovery as laid down in *Yekambaran Marimuthu.* (paras 53 & 54)

Case(s) referred to:

Caparo Industries Plc v. Dickman and Others [1990] 1 All ER 568 ***(refd)***

Compagnie Financiere Du Pacifique v. Peruvian Guano Company (1882) 11 QBD 55 ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] 1 LNS 189 FC ***(refd)***

Ikumene Singapore Pte Ltd v. Leong Chee Leng [1993] 2 SLR(R) 480 ***(refd)***

Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors [2003] 5 CLJ 436 HC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [2000] 1 CLJ 503 CA ***(refd)***

Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [2008] 5 CLJ 42 CA ***(dist)***

Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor [2015] 9 CLJ 919 CA ***(refd)***

Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd [1998] 4 CLJ 557 FC ***(dist)***

Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd [2007] 1 CLJ 611 CA ***(refd)***

Teoh Peng Phe v. Wan & Co [2001] 5 CLJ 222 HC ***(refd)***

Yekambaram Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 52, 53(1)
Companies Act 1965, ss. 132, 167(3), 174, 233, 293
Evidence Act 1950, s. 106
Rules of Court 2012, O. 24 r. 3

For the plaintiff - Poh Choo Hoe; M/s Shook Lin & Bok
For the 1st defendant - Eric Tan Choon Heong & Mohammad Danial Hazizan; M/s Ong Kok Bin & Co
For the 2nd defendant/liquidator - Charan Jit Singh; M/s VS Viswa & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Khadijah Idris JC:

Introduction

[1] Plaintiff, Chip Lam Seng Sdn Bhd a private company in liquidation instituted, through its liquidator, an action *vide* Saman Pemula 24NCC-211-05-2015 (OS) against Eupohoria Technologies Sdn Bhd (first defendant) and Team Durable Sdn Bhd (second defendant), pursuant to s. 293 of the Companies Act 1965 (Companies Act) read with s. 52 of the Bankruptcy Act 1967 (Bankruptcy Act) and/or under the inherent jurisdiction of the court. The relief sought, *inter alia*, is as follows:

(a) a declaration that the transfer of the plaintiff's 500,000 shares ("sale shares"), held in the second defendant, to the first defendant, are absolutely void as against the liquidator of the plaintiff;

(b) second defendant do forthwith rectify its register of members and reinstate the plaintiff's name as shareholder of the sale shares;

(c) second defendant do forthwith issue a share certificate in the name of the plaintiff in respect of the sale shares and deliver the same to the plaintiff; and

(d) first defendant and/or the second defendant do notify in writing to the amount of dividends received by the first defendant in respect of the sale shares and deliver the said amount to the plaintiff.

[2] On 24 November 2015, plaintiff filed an application for discovery and inspection of documents pursuant to O. 24 of the Rules of Court 2012 (encl. 13). Enclosure 13 cited first and second defendants and their former and current officers including the company secretary against whom the discovery order is sought. As the second defendant was ordered to be wound up on 7 August 2015, leave to pursue the action against the second defendant was obtained on 2 November 2015. Thus, second defendant's liquidator was also cited.

[3] The prayers in encl. 13 which is relevant for the purpose of this judgment is as follows:

> LET ALL PARTIES concerned … hearing of an application on the part of the Plaintiff pursuant to Order 24 Rules 3, 5, 7, 7A, 9 and 12 of the Rules of Court 2012 and/or under the inherent jurisdiction of this Honourable Court for the following Orders:
>
> (1) that the 1st Defendant, Looi Choon Pah, Chong Kong Kin, Tan Thian Soon, Lai Siew Leng, Chou Ee Von and Chai Sek Ying do give discovery by making and serving on the Plaintiff's solicitors, within fourteen (14) days from the date of the order to be granted herein, a list of the following documents pursuant to Form 38 of Order 24 rule 5(1) of the Rules of Court, 2012:
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> …
>
> (d) documents relating to the valuation of the consideration price for the sale and purchase of the Sale Shares.
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> …
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> (4) that the 2nd Defendant, Looi Choon Pah, Chong Kong Kin, Ng Yuet Seam, Tan Keng Beng, Tan Bee Yong, Liew King Chuan, Lim Tian Huat and Ong Tee Chew do give discovery by making and serving on the Plaintiff's solicitors, within fourteen (14) days from the date of the order to be granted herein, a list of the following documents pursuant to Form 38 of Order 24 rule 5(1) of the Rules of Court, 2012:
>
> (a) supporting documents for the Balance Sheet for the year 2013, seen at page 8 of the 2nd Defendant's Annual Report and Financial Statements for the financial year ended 31 January 2014, including but not limited to:

(i) supporting documents, including accounting books and records for the purported current liability of RM8,803,039.00 as at 2013 allegedly due by the 2nd Defendant to its related companies;

(ii) supporting documents, including accounting books and records for each entry in the said Balance Sheet under the column for the year 2013, i.e. entries under the headings of: 'Non-Current Assets', 'Current Assets', 'Current Liabilities', 'Non-Current Liability' and 'Share Capital';

(b) supporting documents for the Income Statement for the year 2013, seen at page 10 of the 2nd Defendant's Annual Report and Financial Statements for the financial year ended 31 January 2014, including but not limited to:

(i) supporting documents, including accounting books and records for each entry in the said Income Statement under the column for the year 2013, i.e entries under the headings of: 'Revenue', 'Cost of Sales' and 'Administrative Expenses',

(c) a certified true copy of the resolution of the board of directors of the 2nd Defendant, approving the transfer of the Sale Shares to the 1st Defendant and directing the company secretary of the 2nd Defendant to register the same;

(d) executed form or letter of resignation by the directors or managers of the 2nd Defendant;

(e) original share certificate issued in the name of the Plaintiff in respect of the Sale Shares;

(f) original share certificate issued in the name of the 1st Defendant in respect of the Sale Shares.

[4] On 26 April the court made an order, *inter alia*, against first defendant and its officers, namely, Looi Choon Pah and Chong Kong Kin who are the current directors and Tan Thian Soon the current company secretary in respect of prayer 1(d) encl. 13. The court also made an order against the officers of the second defendant, namely, Looi Choon Pah and Chong Kong Kin the current directors and Ng Yuet Seam the company secretary in respect of prayer 4(a) and (b) encl. 13. The first defendant, Looi Choon Pah, Chong Kong Kin and Tan Thian Soon appealed against the said order. The current officers of the second defendant namely Looi Choon Pah, Chong Kong Kin and Ng Yuet Seam also appealed against the said order.

Factual Background

[5] Plaintiff owns the sale shares which is the entire shares issued in second defendant which is 500,000. This makes the second defendant a wholly owned subsidiary of plaintiff. On 6 December 2013, plaintiff disposed of the sale shares *vide* a share sale agreement to the first defendant for a purchase price of RM100,000. On 19 December 2013, AmBank (M) Bhd presented a winding

up petition against the plaintiff. On 24 February 2014, an order winding up the plaintiff was made and Duar Tuan Kiat ("liquidator") was appointed as its liquidator. The sale of the sale shares was discovered by the liquidator in the course of his investigations into the affairs of the plaintiff, in particular concerning its shareholding and its subsidiaries. Upon enquiry, Tan Keng Beng who was a director of the plaintiff and the second defendant related to the liquidator about the sale but did not provide any further details (exh. CLSE 7 encl. 2). While the liquidator was pursuing inquiries with the other office bearers of the plaintiff for, amongst others, details in respect of the sale of the sale shares, the winding up order dated 24 February 2014 was set aside by the Court of Appeal on 26 August 2014. Exactly on the same day Malayan Banking Berhad presented a winding up petition against the plaintiff in the Kuala Lumpur High Court. On 27 October 2014, the plaintiff was wound up again and the liquidator was again appointed as its liquidator.

[6] The liquidator resumed its investigations in respect of the sale shares. Although the liquidator obtained a court order against some of the plaintiff's office bearers, the statement of affairs filed by the officers (Saravanan a/l Subramaniam who is the current director and Lee We Fong who is the current company secretary) do not contain any record on the purported payment for the purchase price of the sale shares by the first defendant. Checks conducted on the limited accounts, books and records of the plaintiff did not indicate any substantial payment made which could have come from the first defendant in respect of the sale of the sale shares. Attempts to get details (including copy of the sale purchase agreement, valuation of the sale shares, company resolution to purchase the second defendants lands and documentary proof of the payment) from the first defendant failed when letters issued to the company on 16 April 2015 (exh. CLSE 10 encl. 2) were not answered. The plaintiff's solicitor had also written to the second defendant's solicitor *vide* letter dated 16 July 2015 requesting for the basis of the purchase consideration and amongst others a copy of the resolution of the first defendant's Board consenting to the consideration for the purchase of the sale shares. In a letter dated 22 July 2015, the first defendant's solicitor replied that the purchase price was based on the net tangible asset of the first defendant as on 2013 which was valued at negative RM465,433. However, no further details or documents as requested were submitted.

[7] It was only after the OS was filed and served on the defendants that the defendants responded. The first defendant through its director Chong Kong Kin affirmed it had paid the purchase price of RM100,000 to Messr Faizal, Nasir and Associates. The price RM100,000 was determined based on the evaluation of the second defendant's audited financial status as on financial year 2013 as reflected in the second defendant's annual report and financial statement for the financial year ended 31 January 2014 (exh. CKK 1 encl. 8). Based on the said financial statement, the second defendant was clearly running at a loss, namely, loss after taxation of RM356,477 and

accumulated losses of RM465,433. Finally, the first defendant produced a copy of the sale share agreement between the plaintiff and the first defendant dated 6 December 2013 which is attached as exh. CKK 2 to encl. 8.

[8] For the liquidator to verify the financial position of the second defendant for the year 2013, he requires all the requisite books and records, in particular the accounting books and records of the second defendant as prayed in para. 4 of encl. 13. This will in turn assist him to verify the value of the sale shares. For instance, the liquidator noted the loss recorded in the balance sheet arose, amongst others, from "amounts owing to related companies" which is RM8,803,039 and RM2,781,099 being other payables and accruals. There is no information (including identity of the related company, accuracy and correctness of the purported debt) as to how the said liabilities were incurred. The liquidator issued various letters to the first defendant (requesting for supporting documents referred to in the share sale agreement dated 6 December 2013), the second defendant (requesting for documents and records of second defendant) and the plaintiff's former solicitor (enquiring on the basis of the value of the sale shares and supporting documents referred to in the share sale agreement dated 6 December 2013). The replies given were devoid of details and appear evasive.

[9] As such the liquidator believes the liability of RM8,803,039 was created for the purpose of surpassing the value of the second defendant's lands valued at RM18,800,000. If the liability of RM8,803,039 is not genuine, the financial position of the second defendant would be in the black with profit of RM8,337,606 which will cause the value of the sale shares to be much higher than the meagre sum of RM100,000.

[10] Such belief is also based on the value of three pieces of lands in Perak ("second defendant's lands") that the second defendant owned back then. A valuation report dated 31 May 2015 was prepared in respect of the second defendant's lands by JS Valuers Property Consultants (Perak) Sdn Bhd. The valuation report was prepared on the instruction of the second defendant for "internal management" purpose. The report estimated the value of the said lands to be RM18,800,000 as at 10 April 2013 (exh. CLSE 23 encl. 9). Under the first winding up order, the liquidator had caused a private caveat to be lodged on the second defendant's lands on 6 May 2014. However, the current directors of the plaintiff, namely, Saravanan a/l Subramaniam and Rosdi bin Abd Wahab had the private caveat removed one week after the first winding up order dated 24 February 2014 was set aside. Subsequently on 10 November 2014 the second defendant transferred the second defendant's lands to Holistic Rewards Sdn Bhd. The liquidator emphasised on the fact that when the sale shares were sold by plaintiff to the first defendant, the second defendant's lands were still part of second defendant's assets.

[11] Due to the failure of the first and second defendants to disclose any material information, the liquidator believes RM100,000 may not reflect the true value of the sale shares. The liquidator also inescapably came to the conclusion that the transfer of the sale shares and the sale of the second defendant's lands were affected to ensure valuable assets in which the plaintiff has interest were disposed of and removed from the creditors of the plaintiff. The liquidator believes the first defendant did not pay any money or gave consideration at all to the plaintiff for the purported sale of the sale shares.

The Plaintiff's Submission

[12] The liquidator submits that since plaintiff was wound up within two years after the transfer of the sale shares, the said transfer is void unless it can be shown that the first defendant is a purchaser in good faith and for valuable consideration.

[13] The liquidator further submits for the sale shares to be considered as being disposed of at a true and fair value, the sale shares must reflect the value of the second defendant. For that purpose, the plaintiff need the documents relating to the valuation of the consideration price for the sale shares as stated at prayer 1(d) and supporting documents in respect of the balance sheet and income statement for the year 2013 as stated in prayer 4(a) and (b) of encl. 13. In particular the plaintiff requires documents to determine the correctness and accuracy of the liabilities registered in the balance sheet as RM8,803,039 which to the plaintiff appears to be created to balance out the asset value of the second defendant. If such figure cannot be substantiated, this raises the question whether such figures were derived to depress the value of the sale shares. Moreover, in the year 2013, the second defendant was a going concern as there were no winding up proceedings against the second defendant then. If the liabilities incurred were not genuine, the sale shares would be able to fetch a higher price, rather than RM100,000.

[14] The plaintiff submits the fact that first and second defendants share common directors in Chong Kong Kin and Looi Choon Pah and the suspicious circumstances surrounding the disposal of the sale shares between first and second defendants may offer some explanation as to why the second defendant objects to encl. 13.

The Defendants' Submission

[15] Learned counsel for the defendants submits the discovery order sought by the plaintiff is merely a fishing expedition to improve its case. This is because to prove an action under s. 293 of the Companies Act read with s. 52 of the Bankruptcy Act there is no necessity for the plaintiff to show consideration and that the transfer of the sale shares is for proper value. As such the documents and information that the plaintiff sought to discover and inspect is not relevant to the OS. Since the relevancy requirement is not proven therefore the third element of possession, custody and control need not be considered.

[16] The defendants also submit there is no necessity for the plaintiff to verify again the audited financial statement because those documents had already been audited by a duly certified auditor. Therefore it is unreasonable and baseless for the plaintiff to challenge the auditor's work by going behind the audit which was duly and properly done by the second defendant's auditor. Moreover the auditor is answerable to members of the company and not prospective buyers. The first defendant contends the plaintiff has no *locus* to request for the inspection of the books and records of the second defendant, which according to the first defendant can only be inspected by the directors pursuant to s. 167 of the Companies Act. Further, it is submitted that s. 233 of the Companies Act only allows the liquidator of the second defendant to apply for the production of the documents, which has yet to be made by the liquidator.

[17] It was further argued the plaintiff should not be concerned with the sale of the second defendant's lands as the said lands were disposed of when the plaintiff was no longer a contributory of the second defendant. The issue of the sale share agreement and justification of the purchase price of the sale shares is no longer of concern as they are now made available in the first defendant's affidavit. It is the first defendant's position that the purchase of the sale shares was in order and above board whereby good consideration was given and there was no breach of the Companies Act and Bankruptcy Act.

Decision

[18] The statutory provision in respect of discovery and inspection of documents can be found in O. 24 r. 3 of the Rules of Court 2012. It provided that:

> **3. Order for discovery (O. 24 r. 3)**
>
> (1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.
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> ....
>
> (4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:
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> (a) the documents on which the party relies or will rely; and
>
> (b) the documents which could -
>
> (i) adversely affect his own case;
>
> (ii) adversely affect another party's case; or
>
> (iii) support another party's case.

5. Form of list and affidavit (O. 24 r. 5)

(1) A list of documents made in compliance with rule 3 shall be in Form 38, and shall enumerate the documents in a convenient order and as shortly as possible but describing each of them or, in the case of bundles of documents of the same nature, each bundle, sufficiently to enable it to be identified.

(2) If it is desired to claim that any document is privileged from production, the claim shall be made in the list of documents with a sufficient statement of the grounds of the privilege.

(3) An affidavit made as aforesaid verifying a list of documents shall be in Form 39.

(4) Unless otherwise agreed by the parties, a party preparing his list of documents shall cause to be bound and paginated all documents disclosed in Schedule 1 Part 1 to be intituled "List of Documents" and shall file and serve copies of the same on all the parties to the action whereupon the documents shall be deemed to have been inspected.

(5) Non-compliance with paragraph (4) shall preclude the party aforesaid from tendering any such document at the trial, save and except by the leave of the Court.

7. Order for discovery of particular documents (O. 24 r. 7)

(1) Subject to rule 8, the Court may at any time, on the application of any party to a cause matter, make an order requiring any other party to make an affidavit stating whether any document specified or described in the application or any class of document so specified or described is, or has at any time been, in his possession, custody or power, and if not then in his possession, custody or power when he parted with it and what has become of it.

(2) An order may be made against a party under this rule notwithstanding that he may already have made or been required to make a list of documents or affidavit under rule 3.

(3) An application for an order under this rule shall be supported by an affidavit stating the belief of the deponent that the party from whom discovery is sought under this rule has, or at some time had, in his possession, custody or power the document, or class of document, specified or described in the application, and that it falls within one of the following descriptions:

(a) a document on which the party relies or will rely;

(b) a document which could -

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case; and

A (c) a document which may lead the party seeking discovery of it to a series of inquiry resulting in his obtaining information which may -

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

B (iii) support another party's case.

(4) An order under this rule shall not be made in any cause or matter in respect of any party before an order under rule 3 has first been obtained in respect of that party, unless, in the opinion of the Court, the order is necessary of desirable.

C **[19]** As reminded by learned counsel for the parties, the case authority on discovery is *Yekambaram Marimuthu v. Malayawata Steel Bhd* [1994] 2 CLJ 581; [1993] MLJU 96 where Edgar Joseph Jr SCJ held:

The essential elements for an order for discovery are threefold; namely, first, there must be a 'document', secondly, the document must be D 'relevant' and thirdly, the document must be or have been in the 'possession, custody or power' of the party against whom the order for discovery is sought ...

As to 'relevance', our Rules of the High Court limit discovery to documents which are 'relevant to' or 'relate' to the factual issues in dispute.

E More particularly, the discovery obligation applies to documents 'relating to matters in question in the action' or 'relating to any matter in question in the cause or matter'. In practice, relevance is primarily determined by reference to the pleadings but there need not be a pleading for a matter to be said to be in issue ...

F ... relevance is defined broadly. It does not extend to documents relevant merely to a party's credibility unless that itself is a fact in issue. If however, the document's relevance is to the fact in issue, simply not the credibility, it has long been settled that the relevance of an indirect kind suffices.

The observations of Edward Bray I his highly regarded work on discovery G at p. 18 as to the test of "materiality" merits quotation, there he says this:

> … for the purpose of testing the materiality of the discovery to a particular issue … it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought

H In determining the question of relevance, therefore, I would have to apply the principles to be distilled from the authorities which I have cited

[20] In *Ong Boon Hua & Anor v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [2008] 5 CLJ 42; [2008] 3 MLJ 625, the Court of Appeal affirmed the principles enunciated in *Yekambaram Marimuthu v. Malayawata Steel Bhd* I (*supra*) and has this to say:

[38] Under O. 24 r. 10 of the RHC, the court has the jurisdiction to order discovery of a document referred to in an affidavit, whether or not the document is in the possession, custody or power of the party in whose

affidavit the reference to that document is made (*Rafidain Bank v. Agom Universal Sugar Trading Co Ltd & Anor* [1987] 1 WLR 1606; [1987] 3 All ER 859 (CA)). The discretion is vested in the court whether or not to make an order for discovery. An order will not be made if good cause to the contrary is shown. The absence of possession custody or power may amount to a good cause, but it is not always so. At the end of the day, the decision to order discovery is dependent on the facts of each particular case (*Quilter v. Heatly* (1883) 23 Ch D 42, at pp. 48-51 (CA)). Privilege may be a good cause not to allow discovery. Thus, the party against whom the order is sought will be excused if, and only if, he is privileged from producing the document asked for (*Roberts v. Oppenheim* (1884) 26 Ch D 724; and *Milbank v. Milbank* [1900] 1 Ch 376). And 'privilege' has not been raised by Chin Peng. At any rate, Chin Peng's documents can never be classified as privileged so as to prevent him from producing them.

[21] Thus, to succeed in its application for discovery under O. 24, the plaintiff has to fulfil the three requirements as follows:

(a) the document sought must be relevant;

(b) there must be a document that is being discovered; and

(c) the document sought is in the possession, custody or power of that party against whom the order for discovery is sought.

[22] The liquidator's investigation in respect of the disposal of the plaintiff's sale shares in the second defendant has led, amongst other, to the following issues:

(a) whether the purchase price or consideration of the sale shares of RM100,000 was paid to the plaintiff; and

(b) whether the purchase price or consideration of RM100,000 is a true and fair value of the sale shares.

[23] For purposes of determining the above issues the plaintiff has sought to discover from the defendants and its officers, as stated in the prayers of encl. 13, the following documents:

(a) documents relating to the valuation of the consideration price for the sale and purchase of the sale shares;

(b) supporting documents for the balance sheet for the year 2013, seen at p. 8 of the second defendant's annual report and financial statements for the financial year end 31 January 2014, including but not limited to:

(i) supporting documents, including accounting books and records for the purported current liability of RM8,803,039 as at 2013 allegedly due by the second defendant to its related companies;

(ii) supporting documents, including accounting books and records for each entry in the said balance sheet under the column for the year 2013, ie, entries under the headings of: 'non-current assets', 'current assets', 'current liabilities', 'non-current liability' and 'share capital';

(c) supporting documents for the income statement for the year 2013, seen at p. 10 of the second defendant's annual report and financial statements for the financial year ended 31 January 2014, including but not limited to:

(i) supporting documents, including accounting books and records for each entry in the said income statement under the column for the year 2013, ie, entries under the headings of: 'revenue', 'cost of sales' and 'administrative expenses', and

(ii) a certified true copy of the resolution of the Board of Directors of the second defendant, approving the transfer of the sale shares to the first defendant and directing the company secretary of the second defendant to register the same.

[24] Guided by the principles established in the aforesaid authorities, the question which need to be determined by the court is whether the documents sought after by the plaintiff relate to matters in question in the action or relate to any matter in question in the cause or matter. In order to determine relevancy, reference must be primarily made to the pleadings. Ultimately, whether an order for discovery should be made or otherwise depend on the facts of each particular case.

[25] The declaratory relief sought by the plaintiff *vide* the OS is made pursuant to s. 52 of the Bankruptcy Act which is to be read with s. 293 of the Companies Act. For ease of reference both the provisions is reproduced below:

52. Avoidance of voluntary settlement

(1) Any settlement of property, not being a settlement made before and in consideration of marriage or a settlement made in favour of a purchaser or encumbrancer in good faith and for valuable consideration, or a settlement made on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Director General of Insolvency, and shall, if the settlor becomes bankrupt at any subsequent time within five years after the date of the settlement, be void against the Director General of Insolvency, unless the parties claiming under the settlement can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in such property had passed to the trustee of such settlement on the execution thereof.

(2) Any covenant or contract made in consideration of marriage for the future settlement on or for the settlor's wife or children of any money or property wherein he had not at the date of his marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property of or in right of his wife, shall, on his

becoming bankrupt, before the property or money has been actually transferred or paid pursuant to the contract of covenant, be void against the Director General of Insolvency.

(3) For the purposes of this section "settlement" includes any conveyance or transfer of property, bill, bond, note, security for money or covenant for the payment of money and any gift of money.

(4) For the purposes of this section a settlor who dies insolvent shall be deemed to have become bankrupt at the date of his death.

293. Undue preference

(1) Any transfer, mortgage, delivery of goods, payment, execution or other act relating to property made or done by or against a company which, had it been made or done by or against an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner.

(2) For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be -

(a) in the case of a winding up by the Court -

(i) the date of the presentation of the petition; or

(ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed, whichever is the earlier; and

(b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.

(3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.

[26] It is not disputed that the plaintiff was wound up (on 27 October 2014) within two years from the date the plaintiff disposed the sale shares (6 December 2013). What is disputed is the consideration of the share sale agreement, that is, the value attached to the sale shares. It is the liquidator's case that the value of the sale shares at RM100,000 does not reflect the true and fair value of the sale shares. By that the liquidator submits the first defendant is not a purchaser in good faith and for valuable consideration. Understandably, the liquidator requires information and documents to support his case.

[27] Since the first defendant contends the sale shares were valued based on the second defendant's financial standing for the year 2013, naturally the audited financial statement of the second defendant for the said year which is reflected in the second defendant annual report and financial statements for the financial year ended 31 January 2014 need to be perused and analysed. The main financial statement in an audited financial statement of a company would be the balance sheet, income statement and cash flow statement.

[28] Since the documents required to be discovered by the plaintiff substantially relate to the items listed in the balance sheet for the financial year 2013, it is only appropriate for the balance sheet (at p. 8 of the annual report and financial statements for the financial ended 31 January 2014 or p. 28 encl. 8) to be reproduced below:

BALANCE SHEET
As at 31 January 2014

	Note	2014 RM	2013 RM
NON CURRENT ASSETS			
Property, plant and equipment	4	406,891	456,900
Investment property	5	18,265,861	18,265,861
		18,672,752	18,722,761
CURRENT ASSETS			
Other receivables, deposits and prepayment	6	565,632	360,242
Cash and bank balances		34,941	230,325
		600,573	590,567
CURRENT LIABILITIES			
Other payable and accruals	7	1,862,840	2,781,099
Amount owing to related companies	8	19,571,506	8,803,039
Amount owing to directors	9	967,951	-
Term loans RM2,084,133	10	-	2,084,133
		22,402,297	13,668,271
NET CURRENT LIABILITIES		(21,801,724)	(13,077,704)
NON CURRENT LIABILITY			
Term loans	10		(6,110,490)
			(465,433)
Represented by	11	500,000	500,000
SHARE CAPITAL			
ACCUMULATED LOSS		(3,628,972)	(965,433)
		(3,128,972)	(465,433)

[29] Based on the balance sheet for the financial year 2013 above it is clear the second defendant's accumulated loss was RM465,433. The balance sheet also recorded the second defendant's non-current assets at RM18,722,761 and its current liabilities then was RM13,668,271. The bulk of its current liabilities arose out of amount "Amount owing to related companies" in the sum of RM8,803,039 followed by "other payables and accruals" at

RM2.781,099. Its non-current assets which consists property including investment property was at RM18,722,761. In regards to the second defendant's loss for the financial year 2013 it was recorded at RM356,477 in the income statement and cash flow statement.

[30] In order to evaluate the second defendant's financial status for the financial year 2013, the audited financial statement of the second defendant for the financial year 2013 need to be looked into, in particular the balance sheet and the income statement. The balance sheet reflects the assets the company own and the liabilities it owe, and both assets and liabilities will ultimately reflect the company's worth. The only information available in respect of the various items listed in the balance sheet is the notes to the financial statements indicated thereto. For instance, at p. 15 of the annual report and financial statements for the financial year ended 31 January 2014, it was stated in the said notes that the investment property worth RM18,265,861 for financial year ended 2013 consists the following:

(a) leasehold land and building of RM7,903,157; and

(b) capital work in-progress of RM10,362,704.

Item (a) does not seem to include the second defendant's lands worth RM18,800,000. If so, this definitely raises questions which eventually relates to the value of the second defendant. Assuming the auditor had vouched the financial statements have been properly drawn up in accordance with the relevant accounting standards so as to give a true and fair view of the financial position, the financial performance and cash flow of the second defendant as of 31 January 2013, the auditors may be justified from the accounting perspective not to capture the second defendant's land under the item investment property. But that is not the issue in so far the OS is concerned.

[31] The OS is concerned with the transfer of the sale shares and the true value of sale share which is very much dependent on the financial standing of the second defendant. Thus for that purpose the books, records, documents which makes up the financial statement of the second defendant relating to the entries in the balance sheet, income statement and cash flow will have to be examined for purpose of determining the company's worth which will eventually reflect the value of the share.

[32] It is without a doubt the books, records and documents sought relate to matters in question in the OS, namely, the value of the sale shares which will eventually determine whether the transfer of the sale shares is void for want of good faith and valuable consideration. If the figures stated in the financial statement cannot be substantiated this will consequentially cast serious doubt whether the value of the sale shares which was fixed at RM100,000 was the true value.

[33] Therefore it is the considered opinion of the court that the documents sought to be discovered by the plaintiff as stated in prayers 1(d), 4(a) and (b) of encl. 13 is likely to shed some light as to the second defendant's worth which is relevant to the issues in dispute as stated in the prayers of the OS, in particular the purchase of the sale shares at a purchase price of RM100,000. In this regard the plaintiff has made known the documents which are required to be disclosed as expressly stated in prayers 1(d), 4(a) and (b) of encl. 13. As such the plaintiff cannot be said to be on a fishing expedition. (*Ong Boon Hua & Anor* (*supra*)).

[34] Learned counsel for the defendants relied on *Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors* [2003] 5 CLJ 436 to argue that the act of requesting for discovery of the relevant documents amount to shifting the burden of proof to the defendants. The plaintiff in *Kenwood Electronics* (*supra*) premised its cause of action against the second, third and fourth defendants on alleged conspiracy to defraud. In support of its application for discovery the plaintiff relied on s. 106 of the Evidence Act 1950 and contended certain facts were solely within the knowledge of the second, third and fourth defendants who therefore bear the evidential burden to disclose the facts or documents in order to enable the plaintiff to fulfil its legal burden to prove the allegation of fraud against the said defendants.

[35] The High Court in *Kenwood Electronics* (*supra*) held it is trite law that the burden to prove fraud lies on the person who asserts it. The court held that an order compelling the defendants to disclose and produce documents would have the effect of shifting the legal burden of proof, namely, to prove conspiracy to defraud from the plaintiff to the defendant and accordingly dismissed the discovery application.

[36] In the instant case the cause of action is not one of fraud, rather for declaratory relief that the transfer of the sale shares to be declared void for want of good faith and valuable consideration. The plaintiff's encl. 13 for discovery is not made under s. 106 of the Evidence Act 1950 but pursuant to O. 24 of the Rules of High Court 1980. The court is in agreement with the liquidator's submission that *Kenwood Electronics* (*supra*) therefore should be distinguished and not relevant to the instant case. The mere fact that discovery is allowed cannot be said to have shifted the burden of proof on the defendants because such burden still remain with the plaintiff to prove its case under s. 293 of the Companies Act read with s. 52 of the Bankruptcy Act. This is so because the documents may contain information which adversely affect or support the plaintiff's case. In this regards reliance is made on *Ong Boon Hua & Anor* (*supra*) where the Court of Appeal in its judgment referred to the case of *Compagnie Financiere Du Pacifique v. Peruvian Guano Company* (1882) 11 QBD 55 where Bret LJ set out the principles of law governing discovery as follows:

> The documents to be produced **are not confined to those which would be evidence either to prove or disprove any matter in question in the action** … It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, **contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary,** if it is a document which may fairly lead him to train of inquiry, which may have either of these two consequences …
>
> (emphasis added)

[37] Upon the disclosure and inspection of the documents sought, the plaintiff is still required to sift the information so as to, *inter alia*, determine the material facts to support its case by checking and verifying the evidence it relied on and to narrow the points in issue. Therefore the onus of proving the transfer of the sale shares is void for want of good faith and valuable consideration is at all material time on the plaintiff.

[38] The defendants also relied on *Ong Boon Hua & Anor* (*supra*) to support its contention that the discovery of the documents has the effect of shifting the burden to the defendants. After having perused the judgment in *Ong Boon Hua & Anor* (*supra*) the court found shifting of burden of proof was not the issue, neither was it discussed by the court. The brief facts there - the plaintiff *vide* an originating summons had applied, *inter alia*, for a declaration that the plaintiff and all those persons represented by him have the right to enter, domicile, reside and stay in Malaysia. The plaintiff had averred in his affidavit that he was born in Malaya, remains a Malaysian citizen, did not relinquish his citizenship neither was he banished from Malaysia. The respondent filed an application for discovery and inspection of the documents to support the appellant's averments. The court agreed with the respondent's submission that the burden of proof is on the appellant and invoked s. 106 of the Evidence Act 1950 which provided that when a fact is especially within the knowledge of any person, the burden of proving that fact is upon that person. The Court of Appeal upheld the High Court's decision which ordered for discovery and inspection of the documents sought by the respondent, the documents which are held to be relevant to ascertain the issue of the appellant's Malaysian citizenship. Shifting the burden of proof was not an issue and not discussed. Therefore reliance on *Ong Boon Hua & Anor* (*supra*) to support the contention in respect of shifting of burden of proof is misplaced.

[39] Learned counsel for the defendants relied on *Sime Diamond Leasing (Malaysia) Sdn Bhd v. JB Precision Moulding Industries Sdn Bhd* [1998] 4 CLJ 557; [1998] 4 MLJ 569 to advance its argument that the documents sought by the plaintiffs is not relevant to the OS. In *Sime Diamond Leasing (Malaysia) Sdn Bhd* (*supra*) the Federal Court held for the purpose of proving a case under s. 293 of the Companies Act five conditions must be satisfied:

(a) that the transaction in question took place within six months prior to the commencement of winding up;

(b) that it satisfies the description of one of the types of transaction mentioned in s. 53(1) of the Bankruptcy Act;

(c) that it took place at a time when the company was insolvent;

(d) that the person in whose favour the transaction was effected stood in the relation of creditor to the company; and

(e) the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up.

[40] Learned counsel for the liquidator pointed out that in *Sime Diamond Leasing (Malaysia) Sdn Bhd* (*supra*) the action brought by the liquidator for *JB Precision* was under s. 293 read with s. 53 of the Bankruptcy Act, which is not applicable in the instant case. Section 293 of the Companies Act can be read either with s. 52 or s. 53 of the Bankruptcy Act and reference was made to *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2015] 9 CLJ 919; [2015] 5 MLJ 770 where the applicability of s. 52 and s. 53 of the Bankruptcy Act was explained and distinguished. In that case Gallant Acres entered into 12 sale and purchase agreements with Silver Corridor to sell and transfer 12 properties. Within two years from the date the agreements Gallant Acres was wound up. Its liquidator applied to set aside the 12 sale and purchase agreements on the ground the purchase price was not received by Gallant Acres and that the consideration was only RM1,440,000 when the said properties were independently valued at RM2,040,000. The Court of Appeal was satisfied, upon perusal of the pleadings and records, that it has always been pleaded by Gallant Acres's liquidator that the sale and purchase of the 12 shops *vide* 12 sale and purchase agreements were not entered into *bona fide* or for valuable consideration and therefore absolutely void. As such it was held s. 52 of the Bankruptcy Act is the relevant provision which ought to be read with s. 293 of the Companies Act. Relying on *Silver Corridor Sdn Bhd* (*supra*) learned counsel for the liquidator submits the applicable provision in the instant case is s. 52 of the Bankruptcy Act read with s. 293 of the Companies Act which has always been the plaintiff's pleaded case. Learned counsel argued, amongst others, at all material time the first defendant was not the plaintiff's creditor and the transfer of the sale shares was not a conveyance or transfer of property in favour of the plaintiff's creditor. Therefore s. 53 of the Bankruptcy Act is not applicable and it follows the ingredients which need to be proven under s. 53 of the Bankruptcy Act as established in *Sime Diamond Leasing (Malaysia) Sdn Bhd* (*supra*) is not relevant for the purpose of the instant case.

[41] In this regard, taking into consideration the OS and the facts as garnered from the affidavits filed, the court is inclined to agree with the liquidator's contention that s. 52 of the Bankruptcy Act is the relevant

provision to be invoked. It follows the element s. 53 of the said Act as laid down in *Sime Diamond Leasing (Malaysia) Sdn Bhd* (*supra*) is not relevant to the OS. As such the liquidator will need to inquire into the basis and justification of the value of the sale shares at RM100,000 to determine whether the said consideration is a valuable consideration. And that can only be duly done by perusing the details financial statements which constitute the second defendant's audited financial year 2013.

There Must Be Documents That Is Being Discovered

[42] The documents sought against first defendant and its current officers including the company secretary and against the second defendant's current directors and company secretary are as identified in prayers 1(d), 4(a) and (b) of encl. 13, which is reproduced at para. 3 above. The items sought, which includes documents relating to the valuation of the sale shares, accounting books and records in relation to the entries in the balance sheet such as 'non-current assets', 'current assets', 'current liabilities', 'non-current liability' and 'share capital' and documents in relation to entries in the income statement such as entries under the headings of: 'revenue', 'cost of sales' and 'administrative expenses' are without doubt documents.

[43] In this regard the defendants did not at any time dispute the plaintiff is seeking to discover documents. Therefore based on *Ng Hee Thoong & Anor v. Public Bank Bhd* [2000] 1 CLJ 503; [1995] 1 MLJ 281, the defendants are taken to have admitted what is sought to be disclosed are documents.

Document Sought Is In The Possession, Custody Or Power Of That Party Against Whom The Order For Discovery Is Sought

[44] It is pertinent to note that the first defendant, its current officer being directors Looi Choon Pah and Chong Kong Kin and the company secretary Lim Tian Huat and the second defendant's directors Looi Choon Pah and Chong Kong Kin and its company secretary Ng Yuet Seam did not at any time dispute or deny being in possession, custody and power of the documents sought for by the plaintiff. The first defendant's affidavit encl. 8 and encl. 17 did not dispute or deny what sought to be discovered are documents. Likewise, the second defendant in its affidavit encl. 7 affirmed by Chong Kong Kin (prior to the winding up of second defendant) and then encl. 15 affirmed by its liquidator did not dispute or deny the same. Under the circumstance, by virtue of *Ng Hee Thoong & Anor* (*supra*) the court concludes that the documents sought by the liquidator are in the possession, custody and power of the said defendants.

Other Related Issues Raised By Defendants

[45] Learned counsel for the defendants relied on s. 167 of the Companies Act and contends the liquidator has no *locus* to ask for the documents because such documents are only available for the directors. It is noted s. 167(3) of the Companies Act provided such records shall be open for inspection by the

directors. This is rightly so because directors are responsible to act in good faith and in the best interest of the company (s. 132 of the Companies Act). Likewise the liquidator, who is an officer of the court is obliged to perform his duty by exercising the powers vested on him under the Companies Act. The liquidator is to run the company, wind up the company business, realise the assets and pay off whatever is due to its creditor and return whatever is left to the members. In particular the liquidator must complete the administration of the asset within a reasonable time and not unduly protract the liquidation. For that the liquidator is in a fiduciary position in relation to the plaintiff. Collating and collecting information and documents is part and parcel of the process to determine and identify the assets to which the plaintiff is or appears to be entitled (s. 233 of the Companies Act).

[46] The defendants' proposition if accepted will limit and restrict the liquidator from performing its statutory duty, including in relation to acts which may amount to improper dissipation of assets of the company. Furthermore, such limitation will prejudice the plaintiff's creditors who are entitled to share rateably in the plaintiff's assets upon realisation and distribution of the assets. For the purpose of performing his statutory duty it is only right for the liquidator to have access to the books and records of the second defendant for the financial year 2013, at which time the plaintiff was the sole contributory of the second defendant, for purpose of verifying the value of the sale shares. To deprive the liquidators from discovering such records (accounting and other records which is likely to sufficiently explain the transactions and financial position of the company) would defeat the very purpose of discovery to enable the court to identify the evidence that is safe to rely on as a basis for findings on disputed facts. Since the documents required relate to matters in question in the OS, the court is of the considered opinion the discovery and inspection of the documents is necessary so as to dispose of the OS fairly and also for purpose of costs saving (*Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] 1 LNS 189; [1981] 1 MLJ 105).

[47] As to whether the second defendant's financial statement for the financial year 2013 which has been verified by the certified auditor can be subject to further verification, reference is made to the case cited by the liquidator's learned counsel, namely, Court of Appeal decision in *Sony Electronics (M) Sdn Bhd v. Direct Interest Sdn Bhd* [2007] 1 CLJ 611; [2007] 2 MLJ 229. The court in *Sony Electronics (M) Sdn Bhd* (*supra*) dealt with the audited statement of accounts of the respondent which was tendered in court to support the respondent's claim for damages for alleged wrongful termination of an agreement by the appellant. The Court of Appeal held:

> [52] It is clear that the statements of account marked as exhs P2A, P2B, P2C, P2D and P2E are by themselves not sufficient to establish the respondent's claim for damages.
>
> [53] They only show profit for 1996 and 1997. **They do not show how the alleged loss had come about.**

[54] Even in Ramlan's testimony as evident from pages 69 onwards (rekod rayuan), although details were given, for example, where it is shown that the volume of services reached RM483,278.15 from April 1994 to March 1995 and it was subsequently reduced to a mere RM1.1m in 1996 and plunged to RM300,000 in 1997, the respondent **failed to prove the contents and show how their contents were related to the alleged breach** of the agreement. No **evidence whatsoever was led by the respondent with regard to the computation or breakdown of the loss allegedly suffered** therefrom flowing from the breach.

[55] The respondent's failure to produce or tender the account books or the necessary support documents upon which the audited statements of account were based is fatal to claim for damages. Thus, we find that the audited statements of account and Ramlan's oral evidence in connection therewith are inadmissible.

[56] The case of *Johnson v. Kershaw* 64 ER 1059 which was followed in *Popular Industries Limited v. Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 illustrates the above position. The Vice-Chancellor in *Johnson v. Kershaw* had observed:

> If the account books had been in evidence, the accountant's statement of the results of his examination of those books, as the evidence of a person of skill might be receivable; but, inasmuch as the books were not in evidence, I must decline to receive the deposition of Mr Seet as to their contents.

[59] Even if Ramlan had in fact been the maker of the audited statements of account, it is still incumbent upon him to **produce the books of account upon which the audited statements were based** (see *KPM Khidmat Sdn Bhd v. Tey Kim Suie* [1994] 2 MLJ 627 and *Popular Industries Ltd v. Eastern Garment* [1989] 3 MLJ 360).

(emphasis added)

[48] Thus, audited statements of accounts can never be taken as proving the statements as always correct and therefore supporting documents are required in order to substantiate the figures. Bound by the decision of the Court of Appeal, the defendants' learned counsel argument is misplaced. Instead, the legal status of the audited financial statement justify the plaintiff's application to have the documents disclosed as the said documents form the basis of the balance sheet, income statement and cash flow statement for the financial year 2013. This is especially so when it is known at the time when the sale shares were disposed to the first defendant, the second defendant's lands worth RM18,800,000 was still part and parcel of the second defendant's assets.

[49] In his oral submission learned counsel for the defendants further cited three cases to support its objection to encl. 13. The cases - High Court case of *Teoh Peng Phe v. Wan & Co* [2001] 5 CLJ 222; [2001] 5 MLJ 149, *Ikumene Singapore Pte Ltd v. Leong Chee Leng* [1993] 2 SLR(R) 480 and House of Lords case of *Caparo Industries Plc v. Dickman and Others* [1990] 1 All ER 568.

Having perused the two cases, the court is of the view the two cases are of no assistance to the defendants. Instead *Caparo Industries Plc* (*supra*) may be used against the defendants, for the reasons stated below.

[50] The case of *Teoh Peng Phe* (*supra*) was cited by the defendants to support their proposition that the plaintiff is only entitled to the documents sought if there is an allegation of fraud. The OS filed by the plaintiff is not alleging fraud against the defendants. Rather, at this stage the plaintiff is concerned with discovering documents to obtain information to support its case in respect of the transfer of the sale shares valued at RM100,000. And the documents sought are the accounting books and records in respect of the entries in the balance sheet and income statement in the possession, custody or power of the first defendant and its officers and that of the second defendant, which were never denied by the defendants to be in their possession, custody or power.

[51] Learned counsel for the defendants argued that the auditor owes a duty of care to the members of the company and not to prospective buyers. He relied on *Caparo Industries Plc* (*supra*) and *Ikumene Singapore Pte Ltd* (*supra*) where the court held, *inter alia*, that the auditor's statutory duty to prepare accounts was owed to the body of the shareholder as a whole and not to an individual shareholder so as to enable the shareholders as a body to exercise informed control of the company.

[52] It follows that the auditor of the second defendant in discharging his statutory duty to prepare the accounts for the financial year ended 2013 owe a duty of care to the body of the shareholders of the second defendant, and at that material time the plaintiff was the sole shareholder holding the entire issued shares in the second defendant. Under s. 174 of the Companies Act 1965 an auditor is required to report to the members on the accounts required to be laid before the company in a general meeting and on the company's accounting and other records relating to those accounts. The auditor is also required, amongst other, to certify the accounts are in his opinion properly drawn up so as to give a true and fair view of the matters in the profit and loss account and the balance sheet or any defect or irregularity in the accounts or any matter not set out in the accounts without regard to which a true and fair view of matters dealt with by the accounts would not be obtained. The auditor is also obliged to form an opinion as to whether all information and explanations required is obtained and shall state particulars of any deficiency, failure or shortcoming in respect thereof. Due to the statutory duty owed by the auditor to the plaintiff (who as at the financial year ended 31 January 2013 is the sole contributory of the second defendant) it is only appropriate and reasonable for the plaintiff to be supplied with the supporting documents sought to be discovered by the plaintiff *vide* encl. 13.

[53] The second defendant through its director Chong Kong Kin said the plaintiff ought not to be concern with the sale of the second defendant's lands for the simple reason plaintiff was not a contributory of the second defendant when the said lands were disposed of. It is a fact when the second defendant's lands were disposed of in November 2014, the second defendant was not a subsidiary of the plaintiff as the plaintiff had divested its entire shareholding in the second defendant in December 2013. The issue here is not so much of the transfer of the second defendant's lands, rather the undisputed fact that at the time when the plaintiff divested its entire shares in the second defendant to the first defendant, the said lands were the second defendant assets. This must be and ought to be a concern to the liquidator as the second defendant's worth will eventually determine the value of the second defendant which depends, amongst other, on the assets it owns. What more, within two years after plaintiff transferred the sale share to the first defendant, the plaintiff was wound up. Such transfer may amount to undue preference prohibited under s. 293 of the Companies Act. Therefore the liquidator has every reason to be concern with the second defendant's lands insofar the said lands were the second defendant's assets at the time the sale share were disposed of by the plaintiff, especially so when the liquidator is obliged to duly manage and administer the plaintiff's assets towards winding up the plaintiff in accordance with the Companies Act.

Conclusion

[54] Upon thorough consideration of encl. 13, the affidavits and the written and oral submission by the parties I am satisfied, based on the aforesaid reasons that the liquidator has proved the essential elements for an order for discovery as laid down in *Yekambaram s/o Marimuthu* (*supra*). I had therefore accordingly allowed prayer 1(d) in respect of the first defendant and its officers Looi Choon Pah, Chong Kong Kin and Tan Thian Sum and prayer 4(a) and (b) in respect of Looi Choon Pah, Chong Kong Kin ang Ng Yuet Seam being officers of the second defendant.